No. 87-560

In the Supreme Court of the United States

OCTOBER TERM, 1987

FMC WYOMING CORPORATION, PETITIONER

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Section 6 of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. 207, which provides that the Secretary of the Interior shall not include in a coal lease a royalty of less than 12½% of the value of the coal, applies to leases entered into prior to FCLAA's enactment upon post-FCLAA readjustment of their terms.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 816 F.2d 496. The opinion of the district court (Pet. App. 12a-20a) is reported at 587 F. Supp. 1545. The opinion of the Interior Board of Land Appeals (Pet. App. 21a-31a) is reported at 74 I.B.L.A. 389.

JURISDICTION

The court of appeals entered its judgment on April 9, 1987. A petition for rehearing was denied on July 8, 1987. The petition for a writ of certiorari was filed on October 6, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 1, 1963, the Department of the Interior issued two coal leases to FMC Wyoming Corporation (FMC) pursuant to the Mineral Lands Leasing Act of 1920

(MLLA), ch. 85, 41 Stat. 437. Section 7 of that Act then provided that leases were for "indeterminate periods," but that "at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods" (30 U.S.C. (1958 ed.) 207). The terms of the two FMC leases reflect this statutory provision. Under each lease, the United States expressly reserved "[t]he right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period" (Pet. App. 62a-63a, 76a-77a).[1] The initial royalty rate established by the two leases in 1963 was 17½ cents per ton of coal (*id.* at 58a, 72a).

In 1976, Congress enacted the Federal Coal Leasing Amendments Act of 1976 (FCLAA), Pub. L. No. 94-377, 90 Stat. 1083, Section 6 of which amended Section 7 of the MLLA in two relevant respects (90 Stat. 1087). First, rather than being conferred for a nominally "indeterminate period" subject to readjustment and other conditions, "[a] coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease," but "[a]ny lease which is not producing commercial quantities at the end of ten years shall be terminated" (30 U.S.C. 207(a)). FCLAA also raised the floor on royalty rates. The Secretary must now "require payment of a royalty in such amount as the Secretary shall determine of not less than 12½ per centum

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[1] The appendix to the petition for a writ of certiorari inaccurately omits "unless" prior to the phrase "otherwise provided by law" (see Pet. App. 63a, 77a). The petition accurately reproduces the language of the two leases (see Pet. 3).

of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations" (*ibid.*). Under FCLAA (*ibid.*), "rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended."

2. On August 23, 1982, six months before the two FMC coal lease terms were subject to their first 20-year readjustment, the Bureau of Land Management (BLM) notified FMC that it intended to readjust the 1963 leases (Pet. App. 32a). On December 22, 1982, BLM notified FMC that, as readjusted, the two leases would incorporate the requirements of the FCLAA, including the 20-year term and the minimum royalty rate of 12½% of the value of the coal (*id.* at 32a-34a). FMC filed objections to the new lease terms (*id.* at 120a-125a). BLM dismissed the objections (*id.* at 32a-36a) and the Interior Board of Land Appeals affirmed (*id.* at 21a-31a).

3. On August 29, 1983, FMC brought this action in the United States District Court for the District of Wyoming, which reversed the Secretary's determination (Pet. App. 12a-20a). The district court held (*id.* at 17a, 20a) that it was arbitrary and capricious to "flatly and mandatorily impose[ ] [the new rate] on pre-existing leases at the time of readjustment" without "a complete evaluation of all the factors involved in an individual case." The court accordingly remanded the matter to BLM for "careful consideration of the facts and circumstances involved in [readjustment], and especially those specific to [FMC's] leases" (*id.* at 20a).

4. The court of appeals reversed (Pet. App. 1a-11a). The court concluded (*id.* at 9a-11a) that Section 6 of FCLAA applies where, as in this case, leases entered into prior to FCLAA are subject to readjustment subsequent to the effectiveness of FCLAA. The court stressed (Pet. App.

11a) that both the language of the statute in effect at the time the leases were entered into and the terms of the two leases support the application of the requirements of FCLAA upon readjustment of the leases.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Contrary to petitioner's assertion (Pet. 8-11), the court of appeals' decision does not conflict with the principle that, in the absence of clear expression of congressional intent to do so, " 'retrospective operation will not be given to a statute which interferes with antecedent rights.' " Pet. 9 (quoting *Union Pacific R.R.* v. *Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913)); *United States* v. *Security Indus. Bank*, 459 U.S. 70, 79 (1982). Application of Section 6 of FCLAA to FMC's leases neither interferes with "antecedent rights" nor constitutes a "retrospective operation" of law.

Both of FMC's coal leases expressly provided, as did the MLLA in 1963 when those leases were entered into, that their terms and conditions were subject to "readjustment" at the expiration of a 20-year period. Both further provided that the Secretary could exercise his judgment in "reasonably" adjusting the terms and conditions "unless otherwise provided by law at the time of * * * expiration" (Pet. App. 63a, 77a; see note 1, *supra*). At the time of the expiration of the 20-year period, which was seven years after FCLAA was enacted, Section 6 of that Act provided that the Secretary must establish a royalty rate of not less than 12½% of the value of the coal mined. Thus, the Secretary's determination that the royalty must henceforth be paid at the 12½% rate is simply a readjustment of the two leases as expressly contemplated by their terms. It is

fully consistent with FMC's rights under the leases and is not retroactive in nature.[2]

For this reason, there is no merit to petitioner's claim (Pet. 11-13) that Section 6 of FCLAA must be construed not to apply to petitioner's leases in order to avoid a Fifth Amendment taking. Application of Section 6 to petitioner's leases, at the time those leases are by their terms subject to readjustment, is not an unconstitutional taking or, indeed, a taking at all. It is well settled that Congress may, as it did in petitioner's leases, reserve to itself the authority to amend the law and thus the terms by which continuation of the leases will be offered without offending the Fifth Amendment Takings Clause. See *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, No. 85-521 (June 19, 1986), slip op. 11-14; see also *Ruckelshaus* v. *Monsanto*, 467 U.S. 986, 1005-1010 (1984).[3]

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[2] Petitioner ignores the substantial restrictions included in the 1963 leases in claiming (Pet. 8) that "[t]he contract and property rights created by the indeterminate term coal leases issued under [the MLLA] are * * * vastly more substantial than those created by section 6 of the FCLAA." Although the prior leases were issued for an indeterminate period, they were subject to periodic readjustment of their terms and to cancellation if the lessees did not undertake diligent development or failed to continue to operate the mine (see 30 U.S.C. (1958 ed.) 207).

[3] Petitioner's suggestion (Pet. 10 & n.5) that the increased royalty rate may force some pre-FCLAA lessees to abandon valuable coal deposits ignores the possibility of relief under Section 39 of the Mineral Lands Leasing Act, 30 U.S.C. 209. Section 39, which was not affected by FCLAA, allows the Secretary to reduce the royalty rate to promote development or to allow a lessee to operate a mine successfully. Thus, even if there otherwise were a basis for petitioner's taking claim, "[t]he potential for such administrative solutions * * * [would indicate] that the taking issue * * * simply is not ripe for judicial resolution." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981) (footnote omitted).

2. Moreover, congressional intent to apply the requirements of Section 6 of FCLAA to pre-FCLAA coal leases upon post-FCLAA readjustment of their terms is clear. Representative Mink, whom petitioner describes (Pet. 14) as the "principal author" of FCLAA, addressed that question during the legislative debates: "The 533 existing Federal leases would be unaffected by the bill except to the extent its provisions are made applicable upon the periodic ten year adjustment of lease terms, or upon the inclusion of an existing lease in a logical mining unit" (see 122 Cong. Rec. 489 (1976); *id.* at 25464 (remarks of Rep. Baucus); see also S. Rep. 95-1169, 95th Cong., 2d Sess. 7 (1978) ("[a]ll leases would of course be subject to the provisions of the 1976 amendments at the expiration of their original lease term[s]."); Pet. App. 10a-11a n.11). Hence, the court of appeals, which is the first court of appeals to address the issue,[4] correctly upheld the Secretary's construction of Section 6 of FCLAA.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[4] Amici (Br. Western Coal Traffic League 9-10; Br. Nat'l Coal Ass'n 13-14; Br. Colowyo Coal Co. 3-4) argue that this Court should grant review in this case to prevent "anticipated" or "possible" conflicts in the circuits. There is, however, no reason to assume that a conflict will develop or for this Court to depart from its usual practice of waiting to see whether an actual conflict develops.

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